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NTSB Order No. EA-3651

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of August , 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

v.

HENRY SCHNEIDER and RICHARD
SAUER ,

Respondents.

Dockets SE-10645
SE-10646

OPINION AND ORDER

The respondents are appealing from the oral initial decision of Administrative Law Judge William R. Mullins, issued in this proceeding on April 17, 1990 at the conclusion of an evidentiary hearing.¹ The two cases were consolidated for hearing on January 26, 1990. The law judge affirmed an order of the Administrator issued on October 25, 1989, suspending respondent

¹A copy of the oral initial decision, an excerpt from the transcript, is attached.

Schneider's Airline Transport Pilot Certificate and respondent Sauer's Flight Engineer Certificate for 90 days each, alleging that respondent Schneider violated sections 91.125(a), 121.315(c), and 91.9 of the Federal Aviation Regulations (FAR) , 14 CFR Parts 121 and 91, and alleging that respondent Sauer violated sections 121.315(c) and 91.9 of the FAR.² Both penalties were waived due to timely reporting of the incident under the Aviation Safety Reporting Program (ASRP) . The law judge nevertheless reduced respondent Sauer's sanction to 45 days with the penalty still waived. The Administrator did not appeal the reduction.

The incident giving rise to this proceeding occurred on April 22, 1988. Respondent Schneider was acting as pilot-in-command of a Boeing 727, operated as Continental Airlines Flight

²FAR sections 91.125(a) (currently section 91.183(a)), 121.315(c) , and 91.9 (currently section 91.13(a)) state, in relevant part:

"§ 91.125 *IFR Radio Communications*.

The pilot in command of each aircraft operated under IFR in controlled airspace shall have a continuous watch maintained on the appropriate frequency and shall report by radio as soon as possible--

(a) The time and altitude of passing each designated reporting point, or the reporting points specified by ATC, except that while the aircraft is under radar control, only the passing of those reporting points specifically requested by ATC need be reported."

"§ 121.315 *Cockpit check procedures*.

(c) The approved procedures must be readily usable in the cockpit of each aircraft and the flight crew shall follow them when operating the aircraft."

"§ 91.9 *Careless or reckless operation*.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.'*

1720 from Las Vegas, Nevada to Denver, Colorado. Respondent Sauer was the qualified second officer on board flight 1720, but he was riding in the jump seat behind the Captain because he was monitoring an individual who was performing the duties and functions of the second officer as part of an Initial Operating Experience (IOE). Continental 1720 was on approach into Denver-Stapleton International Airport. The brief for the respondents details several distractions that occurred during the flight that they feel justified or excused the improper or non-performance of the checklists.³ The initial decision of the law judge rejects this argument. The Board agrees.

While the Automatic Terminal Information Service (ATIS) was not broadcasting which ILS approach into Denver should be used, the two airplanes that landed ahead of Continental 1720 were both cleared for the ILS DME-2 converging approach, and Continental 1720 was also cleared for and acknowledged that approach.⁴ Because the crew of Continental 1720 had been running the approach checklist for the other ILS approach into Denver (the

³The distractions that Continental flight 1720 was faced with were: an issuance of an approach they were unprepared for; their knowledge of the intermittently alarming glide slope indicator; a terrain warning in the cockpit; and the presence of another aircraft leaving the runway.

⁴The glide slope was also alarming intermittently. Had the glide slope not been working properly, it would not have been possible to run the ILS DME-2 (converging) approach. However, testimony revealed that intermittent alarming of the glide slope does not necessarily signify a problem unless the alarm becomes continuous. Also, it appears that none of the other aircraft using the converging approach complained of problems with the glide slope, and, if the crew had concerns about the glide slope's reliability, they should have called ATC.

ILS DME-1 approach) , it was necessary under Continental procedures for them to re-run the approach checklist once they were cleared for the converging approach. At the time that Continental 1720 was given the converging approach they were about five miles out from the HILIE intersection.⁵

The air traffic control (ATC) assistant working in the tower that day testified that he saw Continental 1720 on his radar at the time it crossed the HILIE intersection, but that he did not receive a call from the aircraft until it cleared the clouds some time later, at which point it was reporting that the flight was on a short final.⁶ At that time the air traffic assistant noticed that Continental 1720 was "clean" (no landing gear out), so he immediately advised the flight to check gear down and then, almost simultaneously, advised it to go around.⁷

According to the respondents, as Continental 1720 cleared the clouds at 500 feet, a terrain alarm sounded. Respondent Schneider gave the command to his crew to "stand by,"⁸ but

⁵Three miles is the minimum at which the approach clearance may be given.

⁶The law judge found with regard to the 91.125(a) violation (failure to report position), that it was "undisputed that there was a failure to report at this HILIE intersection." TR 175.

⁷Upon hearing the ATC warning about the landing gear, the pilot flying the plane reached down and started to lower the gear. This partial lowering was observed by the air traffic controller. Respondent Schneider told the pilot flying the plane to "get the gear up," and then the missed approach was executed.

⁸This command had the alleged effect of stopping the checklists. The approach checklist was just being finished, and the landing checklist, which should have been completed before the outer marker had been reached, was never begun.

decided to continue the approach. At 300 feet, he called the tower and made the report that the aircraft was on short final. However, at 200 feet he executed a missed approach.⁹

The law judge found, based on, among other thing's Exhibit 8, which shows an example of an approach profile from Continental's Flight Manual, that the approach checklist should have been completed before this HILIE checkpoint was reached and that the crew had ample time to have done so. The failure to have accomplished the checklist, in his view, constituted a violation of 121.315(c) . The law judge also found a violation of section 91.9, and we agree with that finding.¹⁰ "A pilot is expected to deal with distractions during the flight, and must take particular care during the performance of the landing checklist to ensure that all the items are completed.'" "

Although he reduced the penalty as to Respondent Sauer, the law judge found that he failed to follow a checklist (121.315(c)), and that he also violated section 91.9 of the FAR.

⁹It is not clear from the transcript of the hearing or from the decision of the law judge whether respondent Schneider decided to execute a go around before or after the air traffic controller instructed the flight to do so. Another factor referenced by respondent Schneider in his decision to go around was the presence of another aircraft that had not quite exited the active runway.

¹⁰Respondent's argument that Exhibit 8 should be discounted because it depicts an "ideal" approach is unpersuasive. It may be true that every approach will not be picture perfect, however, a deviation so far from the "ideal" that it creates a substantial risk of landing without the landing gear down is certainly far from acceptable.

¹¹*Administrator v. Boehler*, 3 NTSB 2573, 2574 (1980) (respondent made a gear up landing).

The law judge pointed out, "That's the reason we have people up there . . . because when these things start, if youth pardon the expression, going to hell in a handbasket . . . everybody in the cockpit should be getting involved in bringing the problem to whomever attention or who's ever attention it needs to be brought to." *Id.* at 177. The law judge did not believe that the second officer should be nothing more than a mechanical tool activated by the Captain, and he said, "if we follow that sort of reasoning, it seems to me, rather than having the guy sitting back there, the Captain could just have a switch up there that whenever he's ready for the checklist, he can hit the switch, and a little tape recording would come on, and the tape recording would start going down through it." *Id.* at 176.

With regard to the reduction in penalty, the Board notes, as we have noted before, that "we are of the opinion that our law judges should not undertake to determine what period of suspension would be appropriate for violations found proved where the Administrator has waived service of any suspension. We view such determination as gratuitous and of no precedential force or effect."¹²

¹²*Administrator v. Friday*, NTSB Order No. EA-2894 at 6 *recon. denied*, NTSB Order No. EA-2954 (1989).

ACCORDINGLY , IT IS ORDERED THAT:

1. The respondents' appeals are denied; and
2. The law judge's decision to the extent it is consistent with this opinion and order is affirmed.¹³

VOGT , Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

¹³Sanction is waived in accordance with the terms of the ASRP .